DENNIS L. KENNEDY, NEV. BAR NO. 1462
JOSHUA M. DICKEY, NEV. BAR NO. 6621
PAUL C. WILLIAMS, NEV. BAR NO. 12524
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone Number: (702) 562-8820
Fax Number: (702) 562-8821
DKennedy@BaileyKennedy.com
JDickey@BaileyKennedy.com
PWilliams@BaileyKennedy.com

[Additional Attorneys on Signature Page]

Attorneys for Plaintiffs

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD GRIDER, individually and on behalf of all others similarly situated;

Plaintiff,

vs.

CLARK COUNTY COLLECTION SERVICE, LLC, a Nevada limited-liability company; DOLLAR LOAN CENTER, LLC, a Nevada limited-liability company; and DLC EMPIRE, LLC, a South Dakota limited-liability company,

Defendants.

Case No.: 2:13-cv-01731-KJD-CWH

PLAINTIFF'S MOTION FOR:

(1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT; AND

(2) CERTIFICATION OF SETTLEMENT CLASS

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff Ronald Grider ("Mr. Grider" or "Plaintiff") respectfully requests (the "Motion for Preliminary Approval") that the Court preliminarily approve the class action Settlement Agreement and Release (the "Settlement Agreement") entered into by Plaintiff and Defendant Clark County Collection Service ("CCCS") attached hereto as Exhibit 1. A proposed Preliminary Approval Order, preliminarily approving the Settlement Agreement and certifying a settlement class, is attached hereto as Exhibit 2.

/ / /

/ / /

/ / /

/ / /

The Motion for Preliminary Approval is supported by the papers and pleadings on file, the accompanying Memorandum of Points and Authorities, the exhibits attached thereto, and any oral argument heard by the Court.

DATED this 4th day of December, 2015.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSHUA M. DICKEY
PAUL C. WILLIAMS

GEORGE H. HAINES
DAVID H. KRIEGER
HAINES & KRIEGER
8985 South Eastern Avenue, Suite 130
Las Vegas, Nevada 89123
Phone Number: (702) 880-5554
Fax Number: (702) 385-5518
GHaines@hainesandkrieger.com
DKrieger@hainesandkrieger.com
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff seeks preliminary approval of a class action Settlement Agreement and Release (the "Settlement Agreement") and an order certifying a class for the purposes of a class-wide settlement (the "Settlement Class"). This Settlement Agreement is intended to resolve and settle the "Released Claims" (as described in Section III.I, *infra*) in this matter upon and subject to the terms and conditions contained therein. As this Court is aware, this matter involves Mr. Grider's allegations that CCCS violated the Telephone Consumer Protection Act ("TCPA") and the Nevada Deceptive Trade Practices Act ("NDTPA") by calling him and the putative class members on their cellular telephones without their prior express consent. The parties, after vigorously litigating the matter for two years, have determined that settlement is in the best interests of all involved, including the putative class members. As detailed below, class certification—for the purposes of settlement—is appropriate as the parties' proposed Settlement Agreement is fair, adequate, and reasonable.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

The proposed Settlement Agreement provides for a settlement of up to eight million dollars ($8,000,000.00) and provides a substantial financial benefit to the Settlement Class Members: a *pro rata* award that may be as high as fifteen hundred dollars ($1,500.00)—the maximum amount of damages allowed under the TCPA—but is unlikely to be less than two hundred dollars ($200.00). In return, Plaintiff, on behalf of the proposed Settlement Class, will dismiss this matter and the Settlement Class will unconditionally release and discharge CCCS, Dollar Loan Center, LLC ("DLC Nevada"), and DLC Empire, LLC ("DLC Empire") from all claims relating to this matter.

While the parties are confident of their relative positions on the merits and class certification, the parties have determined that the proposed Settlement Agreement is fair, adequate, reasonable, and in the best interests of all involved. Mr. Grider believes that the Settlement Agreement is appropriate because he recognizes the expense and amount of time required to continue to pursue the matter, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims. Similarly, CCCS, also facing risks and uncertainties, has determined that it is desirable to settle this matter as set forth in the Settlement Agreement. The proposed Settlement Agreement satisfies all of the criteria for preliminary approval.

Accordingly, the Plaintiff moves the Court for an order preliminarily approving the proposed Settlement Agreement, provisionally certifying the Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3) for settlement purposes, directing dissemination of class notice, and scheduling a Final Approval Hearing. The proposed Settlement Agreement, proposed class notices, proposed Preliminary Approval Order, and a proposed Final Approval Order are attached hereto.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Class Action Complaint.

On September 20, 2013, Mr. Grider filed a Complaint against CCCS, DLC Nevada, and DLC Empire (collectively, the "Defendants"), seeking appointment as the class representative for a class of individuals who received telephone calls from CCCS on their cellular telephones in violation of the TCPA. (*See generally* ECF No. 1, Compl.)

Mr. Grider asserted the following claims against CCCS: (1) negligently violating the TCPA by calling him on his cellular telephone utilizing an ATDS; (2) willfully violating the TCPA by calling him

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

on his cellular telephone utilizing an ATDS; and, (3) violating the NDTPA by engaging in a deceptive trade practice through violating "a . . . federal statute or regulation relating to the sale or lease of goods or services." (*Id.* ¶¶ 204-17.)[1]

Mr. Grider alleged a direct claim against DLC Nevada for engaging in a deceptive trade practice by knowingly making a false representation in a transaction and by failing "to disclose a material fact in connection with the sale or lease of goods or services." (*Id.* ¶¶ 199-203, 213-17.) Mr. Grider also alleged that DLC Nevada is liable for CCCS's violations of the TCPA and NDTPA under principles of secondary liability, vicariously liability, enterprise liability, and agency law. (*Id.* ¶¶ 58-61, 71-75.)

Mr. Grider alleged that DLC Empire is liable for (i) CCCS's violations of the TCPA and NDTPA, and (ii) DLC Nevada's violations of the NDTPA, under principles of secondary liability, vicarious liability, enterprise liability, and agency law. (*Id.* ¶¶ 58-61, 71-75.)

B. The Parties Conduct Discovery; Defendants file Motions for Summary Judgment.

On October 15, 2013, the Defendants filed separate Motions for Summary Judgment. (*See generally* ECF No. 15, DLC Empire's Motion for Summary Judgment; ECF No. 16, DLC Nevada's Motion for Summary Judgment; ECF No. 17, CCCS's Motion for Summary Judgment.) The Court preliminarily struck the Motions for Summary Judgment and numerous other related filings. (*See generally* ECF No. 99, Order.) The Defendants then filed a consolidated Motion for Summary Judgment, which the Court denied. (*See generally* ECF No. 103, Order.) Shortly thereafter, the Defendants filed separate Answers to the Complaint. (*See* ECF No. 130, DLC Nevada's Answer; ECF No. 131, DLC Empire's Answer; ECF No. 132, CCCS's Answer.)

During the pendency of the initial Motions for Summary Judgment, the parties began conducting substantial merits and class discovery. (Exhibit 6, Decl. Dennis L. Kennedy ["Kennedy Decl."], ¶ 2.)

C. Mr. Grider Files a Motion for Class Certification; the Court Sets an Evidentiary Hearing.

On August 4, 2014, Mr. Grider filed his Motion for Class Certification. (*See generally* ECF No. 126.) On October 28, 2014, the Court ordered that an Evidentiary Hearing be held on Mr. Grider's

---

[1] *See* NRS 598.0915(15); NRS 598.0923(2)-(3).

Motion for Class Certification in order to address four primary questions:

> 1. What, if any, objective criteria can be used to identify class members where the phone number provided has been reassigned? If no satisfactory objective criteria are available, can the class be defined to avoid this problem?
>
> 2. Precisely what consent was given via the loan documents, and does this consent vary from loan to loan? If consent varies, how does this impact commonality? . . .
>
> 3. Does DLC employ multiple independent systems in making calls, or are all calls generated by various facets of the same integrated system? If multiple independent systems are used, can the class be defined to avoid this commonality problem?
>
> 4. Did Grider's testimony actually suggest that he provided consent for DLC's contact with him in light of Mr. Aviles' multiple declarations, defeating typicality? . . .

(ECF No. 168, Order, at 8:11 - 9:4.)

D. The Parties Engage in Settlement Discussions and Three Lengthy Mediations.

The parties continued to conduct discovery leading up to the evidentiary hearing on Mr. Grider's Motion for Class Certification. (Exhibit 6, Kennedy Decl. ¶ 2.) During this process, the parties were simultaneously engaging in settlement discussions. (*Id.* ¶ 3.) On January 6, 2015, the parties participated in mediation with the Honorable Lawrence Leavitt (Ret.). (*Id.* ¶ 4.) Although the parties made substantial progress toward a settlement, they were unable to reach a resolution. (*Id.*)

One day prior to the evidentiary hearing, the parties agreed on the general framework of a settlement agreement. (*Id.* ¶ 5.) However, the parties had difficulties reaching agreement on certain terms of the Settlement Agreement and requested that the Court order the parties to engage in a Judicial Settlement Conference with the Honorable Carl W. Hoffman—the Magistrate Judge assigned to the Matter. (*Id.*) On June 19, 2015, the parties attended a Judicial Settlement Conference with Magistrate Judge Hoffman and were able to reach an agreement as to the essential terms of a settlement. (*Id.* ¶ 6.) The parties attempted to reduce their agreement to a fully integrated settlement agreement and release but still were at an impasse as to one term—the definition of the claim amount. (*Id.* ¶ 7.) On September 22, 2015, the parties again attended a Judicial Settlement Conference with Magistrate Judge Hoffman and were able to reach an agreement as to the the definition of the claim amount. (*Id.* ¶ 8.) The parties were then able to finalize and execute the Settlement Agreement. (*Id.*)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

E. The Case Caption is Amended by the Magistrate Judge to Reflect the Current Parties.

On November 2, 2015, in anticipation of the class action settlement, the parties stipulated, and Magistrate Judge Hoffman ordered, that this matter's title and case caption be amended as Mr. Grider is now the only remaining plaintiff in the case and five other defendants had been dismissed from the case. Accordingly, Magistrate Judge Hoffman ordered this matter to be titled and captioned as follows:

> RONALD GRIDER, individually and on behalf of all others similarly situated;
>
> Plaintiff,
>
> vs.
>
> CLARK COUNTY COLLECTION SERVICE, LLC, a Nevada limited-liability company; DOLLAR LOAN CENTER, LLC, a Nevada limited-liability company; and DLC EMPIRE, LLC, a South Dakota limited-liability company,
>
> Defendants.

(ECF No. 221, Stipulation and Order to Amend Case Caption.)

III. THE PROPOSED SETTLEMENT

A. The Settlement Class.

Plaintiff proposes that the Court certify a class for purposes of settlement (the "Settlement Class"). Membership in the Settlement Class ("Settlement Class Members") is defined as follows:

> "Settlement Class Members" or "Settlement Class" shall mean all natural persons, within the United States, who were called by CCCS, on their cellular telephone—excluding calls that were initiated by manually dialing via a desktop telephone—between September 20, 2009 and September 20, 2013 (the "Class Period") as a result of having their telephone number listed by a customer of DLC Nevada as a "Reference" on a credit application. Settlement Class Members do not include recipients of a single telephone call received as a result of a reassigned telephone number, as defined by the Federal Communications Commission in its TCPA Omnibus Declaratory Ruling and Order No. 15-72 (July 18, 2015). Also excluded from the class are Defendants, any parent companies, affiliates, subsidiaries or any employees thereof, and any entities in which any of such companies has a controlling interest; the Judge or Magistrate Judge to whom the Action is assigned and any member of those Judges' immediate families; as well as all persons who validly request exclusion from the Class.

(Exhibit 1, Settlement Agreement, § I.J.)

The "Class Period" is the period of time during which CCCS is alleged to have placed the unlawful telephone calls via an automatic telephone dialing system ("ATDS"), between September 20, 2009 and September 20, 2013. (*Id.*) As part of the settlement process, CCCS shall provide to the

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Claims Administrator, a file, in an electronically searchable and readable format, containing the Settlement Class Members' names and last known cellular phone numbers. (*Id.* § IV.)

CCCS believes that the proposed Settlement Class consists of approximately 18,000 persons. (*Id.*) In order to determine the actual number of Settlement Class Members, each telephone number must be extracted from CCCS's records, and all non-cellular phone numbers excluded. (*See id.*) Upon receiving notification from the Claims Administrator, each Settlement Class Member who makes a timely, valid, and approved claim (an "Approved Claim.") shall be entitled to one (1) (and only one) claim per cellular telephone number called, regardless of the number of calls received by each cellular telephone number. (*Id.* § VI.E.)

B. The Settlement Fund.

Under the Settlement Agreement, the maximum amount payable by CCCS in the settlement of this matter is $8,000,000.00 (the "Total Settlement Pool"). (*Id.* § VI.A.1.) The Total Settlement Pool is composed of two parts: (1) a "Minimum Settlement Fund;" and (2) a "Residual Settlement Fund." (*Id.* §§ VI.A.2-3.) All funds will be maintained in an interest bearing account in a bank located in Clark County, Nevada. (*Id.* § VI.B.)

The "Minimum Settlement Fund" is four million one hundred forty thousand dollars ($4,140,000.00), and is composed of two subparts: (a) attorneys' fees, costs and expenses totaling two million six hundred forty thousand dollars ($2,640,000.00); and (b) a minimum payment (the "Minimum Payment") by CCCS of one million five hundred thousand dollars ($1,500,000.00). (*Id.* § VI.A.2.) The Minimum Payment consists of: (i) claims administration costs, estimated to be one hundred thousand dollars ($100,000.00); (ii) the class representative's incentive award of ten thousand dollars ($10,000.00); and (iii) the "Minimum Aggregate Payout," which is the Minimum Payment less administration costs and the class representative's incentive award. (*Id.*)

The Residual Settlement Fund is the difference between the Total Settlement Pool ($8,000.000.00) less the Initial Settlement Fund ($4,140,000.00). (*Id.* § VI.A.3.) The amount of the Residual Settlement Fund shall not exceed Three Million Eight Hundred Sixty Thousand Dollars ($3,860,000.00). (*Id.*)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

C. The Bank Account.

Within thirty (30) days following the Preliminary Approval, the Claims Administrator shall open an interest bearing account at a federally insured depository bank in Clark County, Nevada, for the purpose of administering the settlement of this matter. (*Id.* § VI.B.) The Claims Administrator will advise the parties of the name of the bank and the account number (the "Bank Account"). (*Id.*) All interest earned on any amounts in the Bank Account shall become part of the Settlement Fund for all purposes and credited against any amounts owed by CCCS pursuant to this Settlement. (*Id.*) Monthly statements for the Bank Account shall be provided by the Claims Administrator to counsel for Plaintiff and CCCS. (*Id.*)

D. Funding the Initial Settlement Fund.

Within thirty (30) days following receipt of the name of the bank and the account number from the Claims Administrator, CCCS will deposit the sum of six hundred thousand dollars ($600,000.00) into the Bank Account (the "Initial Deposit"). (*Id.* § VI.C.1.) On the first day of the first full month following the Initial Deposit ($600,000.00), and on the first day of each of the nineteen (19) consecutive succeeding months—a total of twenty (20) consecutive months—CCCS shall deposit in the Bank Account the sum of One Hundred Seventy-Seven Thousand Dollars ($177,000.00), bringing the total deposits in the Bank Account to Three Million Five Hundred Forty Thousand Dollars ($3,540.000.00). (*Id.* § VI.C.2.) The Initial Deposit ($600,000.00) and the 20 monthly payments of $177,000.00 ($3,540.000.00) comprise the Minimum Settlement Fund ($4,140,000.00). (*Id.* § VI.C.3.)

E. Funding the Residual Settlement Fund.

In the event that the aggregate amount of the Approved Claims exceeds the Minimum Aggregate Payout, CCCS will be required to fund all or part of the Residual Settlement Fund ($3,860,000.00) as needed in order to pay the amount of the Approved Claims. (*Id.* § VI.F.) If, in the judgment of the Claims Administrator, it appears—based upon the number of valid claims received—that the Minimum Aggregate Payout ($1,390,000.00) will be insufficient to satisfy the Approved Claims, then the Claims Administrator shall notify CCCS that the Residual Settlement Fund must be accessed, and all or part of the Residual Settlement Fund must then be deposited by CCCS into the Bank Account, to the extent needed to satisfy the remaining claims. (*Id.*) (The Claims Administrator may give more than one such

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

notice.) (*Id.*) CCCS shall have ninety (90) days from the Claims Administrator's notification to make such deposit, unless CCCS challenges the Claims Administrator's proposed assessment. (*Id.*)

CCCS may challenge the Claims Administrator's proposed assessment to the Magistrate Judge assigned to this matter. (*Id.*) Should the proposed assessment be deemed appropriate by the Magistrate Judge, CCCS shall have ninety (90) days from the Magistrate Judge's order to make such deposit. (*Id.*) If, in the judgment of the Claims Administrator, it becomes necessary to pay valid claims before CCCS makes the deposit from the Residual Settlement Fund, the Claims Administrator may use those monies from the Initial Settlement Fund which had been set aside as Fees and Costs ($2,640,000.00), which monies shall then be replenished when funds from the Residual Settlement Fund are received. (*Id.*)

In the event that the number of Approved Claims, multiplied by seventy dollars ($70.00) exceeds the Claims Pool, the amount paid for each Approved Claim shall decrease on a *pro rata* basis until the sum of $5,250,000.00 is reached, and no further amounts will be owed to the Class Members. (*Id.*)

F. Distribution of the Settlement Fund.

The Claims Administrator shall distribute the funds in the Bank Account in the following order and within the time period set forth with respect to each such payment: (a) First, no later than thirty (30) days after the Initial Deposit, the Claims Administrator shall have $100,000.00 to be held in trust for any costs of administration; (b) Second, no later than thirty (30) days after the Effective Date,[2] the Claims Administrator shall pay to the Class Representative any incentive award ordered by the Court, as described in Section III.N; (c) Third, no later than thirty (30) days after the Effective Date, the Claims Administrator shall pay by check (the "Settlement Checks") to Settlement Class Members their Approved Claims pursuant to Section III.F and an initial *cy pres* award (if any); (d) Fourth, no later than thirty (30) days after the Effective Date, the Claims Administrator shall pay to Bailey❖Kennedy and Haines & Krieger ("Class Counsel") the award of attorney's fees, costs, or expenses ordered by the

[2] As detailed in the Settlement Agreement, the "Effective Date" means "the date of which all appellate and or subsequent proceedings are ended, and/or the time for appeal or further appeal from a final judgment and order of dismissal with prejudice in the Action . . . has passed, such that the Final Judgment and Order of Dismissal with Prejudice takes effect, in its entirety." (*Id.* § VI.I.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Court;[3] (f) Finally, two-hundred ten (210) days after the date on which the last Settlement Check was issued, the Claims Administrator shall pay any amounts remaining, if any, to the *cy pres* recipient. (*Id.* § VI.D-H.)

G. Class Notice.

Notice will be given to the Class by direct mail, a question & answer notice on the settlement website, and by publication of notice throughout the State of Nevada. (*Id.* § VII.C.)

1. Direct Mail Notices.

The Claims Administrator will mail individual class notice via first-class mail in postcard-style form ("Direct Mail Notices") with a unique Claim Identification Number to all of the estimated persons in the Settlement Class. (*Id.* § VII.C.1; *see also* Exhibit 3, Direct Mail Notice.) The Direct Mail Notice will summarize the Settlement Agreement, provide instruction on how to make a claim and opt-out or object, and direct the recipient to a toll-free telephone number and the Settlement Website, where the recipient may learn the details of the Settlement Agreement. (*Compare* Exhibit 3, Direct Mail Notice, *with* Exhibit 1, Settlement Agreement, §§ VII.C.3-4.)

In order to facilitate the mailing of the Direct Mail Notices, the CCCS will provide the Claims Administrator with relevant records of the cellular phone number CCCS called during the Claims Period, in an electronically searchable and readable format. (Exhibit 1, Settlement Agreement, § VII.C.1.) The Claims Administrator will review the cellular phone information provided by CCCS and will do what it believes is necessary to identify class members' most current addresses without calling or contacting DLC debtors or customers. (*Id.*) Any addresses that are found not to be current or which are otherwise inaccurate during the notice and claims process shall be provided upon request to Class Counsel and Counsel for CCCS. (*Id.*) Any mail that is returned undeliverable by the U.S. Post Office (RUM) shall be sent again if a new address is found. (*Id.*) Such re-mails shall be completed immediately upon receipt of the RUM so that such recipients of the new notice shall have a minimum of thirty (30) days to make a claim, *i.e.* mailed again within ninety (90) days of the original mailing. (*Id.*)

---

[3] The parties acknowledge that the Bank Account will not be fully funded to pay all the Attorney's fees at once and that Attorney's Fees will be paid as the ongoing deposits to the Bank Account by CCCS are made.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

2. Q&A Notice on Settlement Website.

A website shall be created and used for purposes of the Settlement Agreement (the "Settlement Website"). (*Id.* § VII.C.3.) The Settlement Website will answer questions about the Settlement, to simplify the filing of claims and to allow anyone to review the important documents relating to the Settlement, including but not limited to the Settlement Agreement, the Court's Orders, and the Motion for Final Approval of the Settlement Agreement. (*Id.*) The long-form Question & Answer Notice form notice ("Q&A Notice") will be made available on the Settlement Website. (*Id.*; see also Exhibit 5, Q&A Notice.) Upon request, and within a reasonable time after the request, the Claims Administrator will mail the Q&A Notice to each person who calls the Settlement Call Center and requests a copy of the full notice. (Exhibit 1, Settlement Agreement, § VIII.C.3.)

3. Publication of Notice.

To provide additional notice to the Settlement Class Members, including the small number for whom there are no names and addresses, the parties intend to publish notice of the Settlement Agreement in two (2) consecutive editions of *Nevada Legal News*, the *Las Vegas Review Journal*, and the *Reno Gazette Journal*. (*Id.* § VII.C.2; *see also* Exhibit 4, Publication Notice.) The summary notice shall direct Settlement Class Members to the Settlement Website and will include the toll-free telephone number for the Claims Administrator running the Settlement Call Center. (Exhibit 1, Settlement Agreement, § VII.C.2.)

4. Toll-Free Number.

A toll-free number will be designated by the Claims Administrator for receiving toll-free calls related to the settlement (the "Settlement Call Center"). (*Id.* § VII.C.4.) The toll-free number for the Settlement Call Center will be identified in the Direct Mail Notices, the summary notice and the Q&A Notice. (*Id.*) Both the toll-free Number and the Settlement Website will permit Settlement Class Members to obtain information and a copy of the Agreement. (*Id.* §§ VII.C.3-4.)

H. The Claims Process and Award to Settlement Class Members.

The Claims process is as simple as the parties can make it. There are three ways a Settlement Class Member may submit a claim: (1) by calling the Settlement Call Center that will be operated by the Claims Administrator; (2) by submitting a claim in writing by overnight mail to the Claims

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Administrator; or (3) by submitting a claim online at the Settlement Website maintained by the Claims Administrator. (*Id.* § VII.D.) The Settlement Class Members have one hundred twenty (120) days from the date the Direct Mail Notices are mailed to submit a claim. (*Id.* § I.D.)

In order to submit a claim, the Settlement Class Member must provide the following information about himself or herself: (1) his or her full name; (2) confirmation of his or her identity and cell phone number pursuant to a procedure determined by the Claims Administrator; (3) the Claim Identification Number, if he or she received a Direct Mail Notice; (4) his or her current address for mailing settlement payment; (5) that he or she was the subscriber or the regular user of the cell phone number that was called; and (6) if known, the name of the debtor for whom he/she was listed as a "Reference." (*Id.* § VII.D.) If the Class Member does not know which debtor listed him/her as a reference, then the Class Member must provide his or her social security number. (*Id.*) Further, the Settlement Class Member must declare, under penalty of perjury, that all the information provided to the Claims Administrator is true and correct. (*Id.*) The Class Administrator will approve all timely and valid claims for individuals whom it verifies, through CCCS's records or other evidence, are Settlement Class Members (an "Approved Claims"). (*Id.* at § VI.G.)

Approved Claims will be awarded a *pro rata* share of the Total Settlement Pool, less the attorneys' fees and costs, claims administration cost, and class representative's incentive award. (*Id.* § VI.E.) Each Approved Claim will entitle a Settlement Class Member to a minimum award of seventy dollars ($70.00) and up to a maximum award of fifteen hundred dollars ($1,500.00)—the maximum amount of damages recoverable for a willful violation of the TCPA. (*Id.* § VI.E.)

The Claims Administrator will send the Settlement Checks via U.S. Mail to the Settlement Class Members who have made Approved Claims no later than 30 days after the Effective Date, or as soon thereafter as the Bank Account contains sufficient funds to cover the Settlement Checks. (*Id.* § VI.G.)

I. Scope of Release.

The scope of the release by all Settlement Class Members, other than those who exclude themselves from the Settlement Agreement, tracks the scope of Plaintiff's allegations in the original complaint relating to the prohibition against "the use of an 'automatic telephone dialing system'" as used in the TCPA. The release also covers known and unknown claims, including NDTPA or any similar state or federal law claims. (*Id.* at §§ XIII - XIV.) The full release will be made available on the Settlement Website at the end of the Q&A Notice. (*See* Exhibit 5, Q&A Notice.)

J. Opportunity to Opt-Out and Object.

Under the terms of the proposed Settlement Agreement, Settlement Class Members will have the right to opt-out of the Settlement Agreement or to object to its terms. (Exhibit 1, Settlement Agreement, §§ IX, XII.) The deadline for opting-out is ten (10) days after the last date of the Claims Period. (*Id.* § IX.) The deadline for objecting is ten (10) days before the Final Approval Hearing date. (*Id.* § X.) Settlement Class Members will be informed of these rights through the Direct Mail Notices, the Q&A Notice on the Settlement Website, the Publication Notice, and information available by calling the Toll-Free Number. (*See* Exhibit 3, Direct Mail Notice; Exhibit 4, Publication Notice; Exhibit 5, Q&A Notice.)

K. Settlement Proceedings Time Schedule.

The settlement proceedings in this matter shall proceed according to the following schedule:

EVENT	SCHEDULED DATE
Direct Mail Notices mailing date	120 days after entry of Preliminary Approval Order
Parties' briefs in support of the Settlement, including fee application and incentive award due	14 days prior to Final Approval Hearing
Last day for Class Members to opt-out of Settlement	130 days after the date the Direct Mail Notices are initially mailed
Last day for objections to the Settlement to be filed with the Court	10 days before the Final Approval Hearing
Last day to submit a Valid Claim Form	120 days after the date the Direct Mail Notices are initially mailed
Parties to file responses to objections, if any	7 days prior to the Final Approval Hearing
Final Approval Hearing	To be determined by the Court

L. Termination of Settlement.

The Settlement Agreement may be terminated by Class Counsel or Defendants after providing written notice of its election to do so is given to the other party within seven (7) days of any of the following occurrences: (a) the Court's refusal to enter a Preliminary Approval Order; (b) the Court's

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

refusal to approve the settlement following the Final Approval Hearing; (c) the Court's refusal to enter a Final Approval Order; or (d) if the Final Approval Order is modified or reversed in material respect by any Court of Appeal or the Supreme Court. (Exhibit 1, Settlement Agreement, § XV.) If either Class Counsel or Defendants terminate the Settlement Agreement, the Settlement Agreement shall be of no force or effect and the parties' rights and defenses shall be restored, without prejudice, to their respective positions as if the Settlement Agreement had never been executed. (*Id.*)

M. Payment of Notice and Administration Costs.

The costs of notice and claims administration are to be paid from the Settlement Fund. (*Id.* § VII.B.) The costs will also include payment of any costs of the Direct Mail Notices, Settlement Website, publication of the summary notice, and claims administration (presently estimated by the Claims Administrator to be approximately $100,000.00), but the final cost will vary depending on a number of factors, including the number of Settlement Class Members and Approved Claims. (*See id.* § VII.B.) If the costs are less than $100,000.00, the remaining funds shall go towards the Minimum Aggregate Payout. (*Id.*)

The Settlement Agreement specifically provides that the estimated administration cost and Direct Mail Notices costs estimated at one hundred thousand dollars ($100,000.00) be held in trust by the Claims Administrator. (*Id.*) The Claims Administrator shall take $100,000.00 from the initial deposit of $600,000.00 deposited by CCCS into the Bank Account for the payment of claims administration costs. (*Id.*)

N. Class Representative's Application for Incentive Award.

The Settlement Agreement provides that Class Counsel will request an incentive award in the amount of $10,000.00 to be paid to the Class Representative, Ronald Grider, subject to Court approval, within thirty (30) days of the Effective Date. (*Id.* § XVII.) Defendants have agreed not to oppose a request for such incentive award in that amount. (*Id.*)

O. Class Counsel's Application for Attorney's Fees and Costs.

The Settlement Agreement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees, costs, and expenses to be paid from the Settlement Fund. (*Id.* § XVI.) Class Counsel shall file an application for attorneys' fees and litigation related costs and

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

expenses in an amount not to exceed thirty-three percent (33%) of the Settlement Fund. (*Id.*) Defendants have agreed not to oppose an application by Class Counsel for an award of attorneys' fees, costs, and expenses as long as it does not exceed thirty-three percent (33%). (*Id.*)

The Settlement Agreement provides that the consideration to be provided to the Settlement Class Members is not contingent on the attorneys' fees to be awarded. (*Id.* § XIII.) In other words, the Court's consideration of Class Counsel's application for attorneys' fees and costs is separate from, and will not operate to terminate, the Settlement Agreement and the finality of the Final Approval Order. (*Id.*)

P. *Cy Pres* Distribution.

If the total amount of paid Approved Claims, class administration costs, and the incentive award is less than the Minimum Payment ($1,500,000.00), then the difference of the Minimum Payment less paid Approved Claims, class administration costs, and the incentive award will be awarded to the Moment of Truth Ministry.

IV. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. Standard of Decision.

A class action may not be voluntarily dismissed, compromised, or settled without the approval of the Court. Fed. R. Civ. P. 23(e). In the context of a class settlement reached prior to certification, the District Court evaluates two primary issues: (1) whether conditional class certification for purposes of settlement is appropriate; and (2) whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (internal quotation marks omitted). As detailed below, conditional class certification is appropriate for the purposes of settlement and the proposed settlement is fundamentally fair, adequate, and reasonable. Accordingly, the Settlement Class should be conditionally certified and the Settlement Agreement should be preliminarily approved.

B. Conditional Class Certification is Appropriate for Purposes of Settlement.

"Under Federal Rule of Civil Procedure 23, '[a] class action may be maintained if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b).'" *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010) (quoting

Shady Grove Orthopedic Assocs., v. Allstate Ins. Co., 559 U.S. 393, 398 (2010)). The four prerequisites of Rule 23(a) are stated as follows: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In this case, certification is appropriate under Rule 23(b)(3), which is satisfied if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). While a court must engage in a rigorous analysis of the Rule 23 factors, an "evidentiary showing need not be extensive." *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646 (W.D. Wash. 2007).

1. The Proposed Settlement Class is Ascertainable.

"To obtain class certification, the plaintiff must prove the threshold requirement of 'ascertainability'—that the proposed class's membership can be determined by objective criteria." *Kristensen v. Credit Payment Services*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) (citing *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014)). The proposed class definitions should describe "a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description" and should not require individualized inquiries to prospective class members. *Id.* (internal quotation marks omitted). The class definition may not be based on the merits of individuals' claims; in other words, "[t]he inquiry into class membership must not require holding countless hearings resembling 'mini-trials.'" *Id.* at 1303.

Here, the Settlement Class is ascertainable from objective criteria—simply, all references who received calls on their cellular telephones from CCCS on behalf of DLC Nevada. CCCS's calling records, which contain the names and telephone numbers of references it has called on behalf of DLC Nevada, can be utilized to easily identify Settlement Class Members. Because the Settlement Class's membership can be determined by objective criteria, "the ascertainability requirement is met." *Kristensen*, 12 F. Supp. 2d at 1303.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

2. The Proposed Settlement Class Satisfies the Requirements of Rule 23(a).

a. Rule 23(a)'s Numerosity Requirement is Satisfied Because the Settlement Class Likely Contains More than 10,000 Individuals.

The numerosity prerequisite is satisfied if "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "Numerosity is presumed at a level of 40 members . . . ." *Greene v. Alan Waxler Grp. Charter Servs., LLC*, No. 2:09-CV-748-JCM-RJJ, 2012 WL 1330262, at *1 (D. Nev. Apr. 17, 2012). The parties estimate that the number of Settlement Class Members is approximately 18,000—which is more than sufficient to satisfy Rule 23(a)(1)'s numerosity requirement. *Greene*, No. 2:09-CV-748-JCM-RJJ, 2012 WL 1330262, at *1.

b. Rule 23(a)'s Commonality Requirement is Satisfied Because there Are Common Questions of Law and Fact.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

The commonality prerequisite requires that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Each plaintiff's "claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v Dukes*, 564 U.S. __, 131 S.Ct. 2541, 2545 (2011). "Commonality focuses on the relationship of common facts and legal issues among class members." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 107 (N.D. Cal. 2008). The commonality prerequisite is "construed permissively and not all questions of fact and law need to be common to satisfy this rule." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 (9th Cir. 2008).

Here, for the purposes of settlement, the proposed Settlement Class Members' claims all stem from the same factual circumstances. Specifically, the proposed Settlement Class Members were all called by CCCS, on their cellular telephones, with equipment that Mr. Grider contends (and the CCCS disputes) constitutes an ATDS. Additionally, the claims present several common questions of law, including: (a) whether CCCS's equipment is an ATDS; (b) whether CCCS obtained the proposed Settlement Class Members' prior express consent through a borrower's listing of the proposed Settlement Class Members' names and telephone numbers on the borrower's Credit Application; (c) whether CCCS's conduct was knowing or willful; and (d) whether DLC Empire and DLC Nevada are liable for CCCS's conduct under principles of secondary liability.

The commonality prerequisite is satisfied here because the Defendants' conduct caused the same injury to each class member. *See Agne v. Papa John's Intern.*, Inc., 286 F.R.D. 559, 567 (W.D. Wash. 2012) (finding commonality satisfied in TCPA class action because "all class members were sent substantially similar unsolicited text messages by the same defendants"); *Knutson v. Schwan's Home Serv. Inc.*, No. 3:12-cv-0964-GPC-DHB, 2013 WL 4774763, at *5 (S.D. Cal. Sept. 5, 2013) (finding that common questions in a TCPA class action included "whether Defendants used an ATDS . . . without the customers' prior express consent" and that "common proof" in the form of "Defendants' business records . . . can answer—in one stroke—each of these questions.").

c. Rule 23(a)'s Typicality Requirement is Satisfied Because Mr. Grider's Claims Arise from the Same Practice and Course of Conduct that Give Rise to the Proposed Settlement Class's Claims.

The typicality prerequisite is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). Thus, "[i]n most cases, a finding of commonality will ordinarily support a finding of typicality." *Bor Pha v. Yia Yang*, No. 2:12-CV-01580-TLN, 2014 WL 654559, at *3 (E.D. Cal. Feb. 19, 2014) (internal quotation marks omitted).

In deciding whether a representative's claims are typical of the proposed class, courts analyze: (1) "whether other members have the same or similar injury;" (2) "whether the action is based on conduct which is not unique to the named plaintiffs;" and (3) "whether other class members have been injured by the same course of conduct." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

First, Mr. Grider's injuries are typical of the proposed Settlement Class. With respect to the TCPA claims, both Mr. Grider and the class members are entitled to statutory damages under the TCPA. 47 U.S.C. § 227(b)(3). Under the NDTPA, Mr. Grider and the class members all suffered the same

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

injury: an invasion of their privacy and a loss of allotted cellular phone minutes and/or additional cellular phone charges. (ECF No. 1, Compl. ¶ 201.) Second, the Defendants' conduct is not unique to Mr. Grider. Specifically, all class members, including Mr. Grider, (i) were called by CCCS, (ii) on their cell phones, (iii) as a result of being listed as a reference on a borrower's DLC Nevada credit application, (iv) in an attempt to locate the borrower for debt collection purposes. Third, the class members (including Mr. Grider) have been injured by the same course of conduct. That is, the Defendants' conduct resulted in violations of the TCPA and NDTPA in the same manner with respect to all the class members—they were called by CCCS because they had been listed as a reference on a borrower's credit application.

In sum, Mr. Grider's claims are typical of all of the proposed Settlement Class Members' claims. *See Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290 BEN NLS, 2013 WL 444619, at *3 (S.D. Cal. Feb. 5, 2013) (finding class representative's TCPA claims were typical where they were based on the same legal theory and "the same factual basis as that of the class: calls made to Plaintiffs using auto-dialing equipment."); *Kristensen*, 12 F. Supp. 2d. at1305 (finding class representatives' TCPA claim typical where defendant engaged in same course of conduct with respect to the class representative and class members).

d. Mr. Grider and his Counsel will Fairly and Adequately Represent the Proposed Settlement Class Members.

The fourth prerequisite is that, "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts analyze two criteria in determining the adequacy of representation: "(1) the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) Plaintiffs are represented by qualified and competent counsel." *Hester v. Vision Airlines, Inc.*, No. 209-CV-00117-RLH-RJJ, 2009 WL 4893185, at *5 (D. Nev. Dec. 16, 2009) (internal quotation marks omitted), *aff'd*, 687 F.3d 1162 (9th Cir. 2012).

i. *Mr. Grider is an Adequate Class Representative.*

Here, Plaintiff is an adequate class representative because his claims and interests are identical to those of the class. Mr. Grider and the proposed Settlement Class Members share a common experience: all were called by CCCS in an attempt to collect on a debt owed to DLC Nevada. Mr. Grider has actively participated in the matter and will continue to vigorously represent the interests of the class members. (*See* Exhibit 9, Grider Decl. ¶ 2.) Moreover, Mr. Grider does not have any conflicts of interest with the proposed Settlement Class. (*Id.* ¶ 3.) Mr. Grider has, and will continue to, adequately represent the class members. *See Kristensen*, 12 F.Supp.2d at 1305 (finding that a class representative met the adequacy prerequisite when "there [were] no indications that [plaintiff] has any conflicts of interest, and he appears sufficiently motivated to vigorously pursue the interest of absent class members.").

ii. *Plaintiff's counsel is qualified to serve as class counsel.*

"Rule 23(a)(4) requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation." *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (internal quotation marks and citation omitted). The court must consider the following factors in appointing class counsel: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

First, both Bailey❖Kennedy and Haines & Krieger have devoted a significant amount of time and energy to adequately identify potential claims in this action. (Exhibit 6, Kennedy Decl. ¶ 9; Exhibit 7, Decl. David Krieger ["Krieger Decl."] ¶ 6.) Second, Bailey❖Kennedy is experienced in class actions, complex litigation, and consumer law. (Exhibit 6, Kennedy Decl. ¶¶ 10-11.) Haines & Krieger devotes a substantial amount of its practice to consumer protection litigation and has served as counsel in seven putative class action matters, including four TCPA putative class actions. (Exhibit 7, Krieger Decl. ¶¶ 3-5.) Third, both Bailey❖Kennedy and Haines & Krieger are knowledgeable in consumer law and have conducted extensive legal research regarding the TCPA and NDTPA. (Exhibit 6, Kennedy Decl. ¶ 10; Exhibit 7, Krieger Decl. ¶¶ 3-5.) Fourth, Bailey❖Kennedy and Haines & Krieger both have the necessary resources to zealously represent the class members and are both prepared to invest the time and resources necessary to adequately serve as class counsel. (Exhibit 6, Kennedy Decl. ¶ 12; Exhibit 7, Krieger Decl. ¶ 7.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Because Mr. Grider is an adequate class representative and has chosen qualified and experienced counsel, this Court should permit Mr. Grider to act as class representative and allow his selected counsel to represent the class members. *See Hester*, 2009 WL 4893185 at *5; *see also In re Cavanaugh*, 306 F.3d 726, 734 (9th Cir. 2002) ("The choice of counsel has traditionally been left to the parties, whether they sue in their individual capacities or as class representatives.").

3. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b)(3).

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (b)(2), or (b)(3)." *Roadhouse v. Las Vegas Metro. Police Dep't.*, 290 F.R.D. 535, 544 (D. Nev. 2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). Here, Mr. Grider seeks to certify a Rule 23(b)(3) class.

In addition to the general requirements of Rule 23(a), a class must satisfy two additional prerequisites under Rule 23(b)(3); specifically: (i) "that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (ii) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Under Rule 23(b)(3), certification "is appropriate whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon* , 150 F.3d at 1022. Moreover, certification under Rule 23(b)(3) is appropriate in matters where class members' claims have small potential recoveries and "do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc.*, 521 U.S. at 617 (internal quotation marks omitted).

As detailed below, the proposed Settlement Class satisfies the additional predominance and superiority requirements.

a. Common Questions Predominate Over Any Individual Questions.

"The predominance inquiry of Rule 23(b)(3) asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (internal quotation marks omitted). In contrast to the commonality requirement of Rule 23(a)(2), the predominance inquiry of Rule 23(b)(3) "focuses on the relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022. "When common questions present a

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Id.* (internal quotations marks omitted). Central to the predominance inquiry is "is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (internal quotation marks omitted) *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

Here, the central inquiry—whether CCCS violated the TCPA by calling the proposed Settlement Class Members on their cellular telephones without their prior express consent—is a common question that predominates over individual issues. Although the issue of prior express consent was contested in the matter, for the purposes of settlement, prior express consent is not at issue—lack of prior express consent is presumed. Further, whether DLC Empire and/or DLC Nevada may be held liable for CCCS's conduct is a question of law which predominates over individual issues.

Accordingly, class certification—for purposes of settlement—is appropriate because when "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

b. A Class Action is the Superior Method of Adjudicating the Common Claims of the Settlement Class Members.

"The focus of superiority analysis is on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Manno v. Healthcare Revenue Recovery Grp.*, 289 F.R.D. 674, 690 (S.D. Fla. 2013) (citation and internal quotation marks omitted); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation.").

"In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser*, 253 F.3d at 1190. The four factors are: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). "A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citation and internal quotation marks omitted).

Lastly, when deciding to certify a class for settlement purposes, Rule 23(b)(3)(D) is inapplicable; the Court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Products, Inc.*, 521 U.S. at 620.

As detailed below, each of the three applicable superiority factors weighs in favor of certification.

i. The Settlement Class Members' Interest in Controlling the Prosecution or Defense is Minimal Because each Settlement Class Member's Damages are Relatively Small.

The first factor is "the class members' interest in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). "Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190. Here, the relatively small amount of damages at stake in a TCPA or an NDTPA action favors class certification. *Kristensen*, 12 F. Supp. 2d at 1308 ("The $500 damage amount for each [TCPA] violation, even if increased to $1,500 for willful violations [of the TCPA], is insufficient to incentivize individual actions."); *Agne*, 286 F.R.D. at 571 ("Five hundred dollars is not sufficient to compensate the average consumer for the time and effort that would be involved in bringing a small claims action against a national corporation . . . ."). Moreover, any class member who wishes to pursue a separate action can opt-out of the Settlement Agreement. (Exhibit 1, Settlement Agreement, § IX.)

ii. No Other Known Litigation Exists Between any Settlement Class Member and the Defendants; thus, Class Resolution Serves Judicial Economy.

The second factor instructs consideration of "the extent and nature of any litigation concerning the controversy already begun by or against class members." Fed. R. Civ. P. 23(b)(3)(B). "This factor is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits." *Zinser*, 253 F.3d at 1191 (quoting Wright & Miller, Federal Practice and Procedure § 1780

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

(2d ed.1986)). When the court is unaware of any other pending litigation, the factor weighs in favor of certification. *See Kristensen*, 12 F. Supp. 2d at 1308; *Agne*, 286 F.R.D. at 571. Plaintiff is not aware of any other litigation between a class member and any of the Defendants; the Defendants are likewise not aware of the existence of other litigation. (Exhibit 6, Kennedy Decl. ¶ 13; Exhibit 7, Krieger Decl. ¶ 8.) Because there are no similar lawsuits, class resolution is a superior method of adjudicating the instant claims. *See Kristensen*, 12 F. Supp. 2d at 1308; *Agne*, 286 F.R.D. at 571.

iii. *The District of Nevada is the Ideal Forum in which to Concentrate the Litigation.*

The third factor obligates a court to consider "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). DLC Nevada and CCCS are Nevada entities. (ECF No. 1, Compl. ¶¶ 14, 23.) DLC Empire is a South Dakota entity headquartered in Sioux Falls, South Dakota. (*Id.* ¶ 15.) DLC empire is registered with the Nevada Secretary of State as a foreign corporation authorized to do business in Nevada, and does substantial business in Nevada. (*Id.* ¶ 16.) Plaintiff is a Nevada resident. (*Id.* ¶ 9.) Thus, Nevada is the most desirable forum in which to concentrate litigation. *See Protectmarriage.com v. Bowen*, 262 F.R.D. 504, 509 (E.D. Cal. 2009) ("There appears to be no reason why concentrating the litigation in this Court would be undesirable considering the presence of Defendants within the state . . . .").

C. The Proposed Settlement Agreement is Fundamentally Fair, Adequate, and Reasonable.

Courts may approve class settlements only after holding a hearing and finding that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The decision to approve a class settlement "is committed to the sound discretion of the trial judge . . . ." *Hanlon*, 150 F.3d at 1026-27. The Federal Judicial Center, through its Manual for Complex Litigation (the "Manual"), has developed a defined procedure and specific criteria for approval of proposed class settlement agreements, including preliminary approval, class notice, and fairness. *See* MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.6, at 420-4858 (2015).

Preliminary approval does not require the Court to make a *final* determination that the settlement is fair, adequate, and reasonable. Instead, the Court is only required to make a "preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms . . . ." *Id.* § 21.632,

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

at 430. So long as the "proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks omitted).

In making a preliminary fairness determination, courts may consider several factors, including: "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel . . . ." *Hanlon*, 150 F.3d at 1026. Courts are to give "proper deference to the private consensual decision of the parties" and their evaluation "must be limited to the extent necessary to reach a reasonable judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* at 1027.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

1. Liability is Highly Contested and Both Sides Face Significant Challenges in Litigating the Matter.

The Defendants have vigorously defended the matter and have raised numerous defenses and strongly believe that they would defeat Plaintiff's attempt to certify a class. (*See generally* ECF No. 130, DLC Empire Answer; ECP No. 131, DLC Nevada Answer; ECF No. 132, CCCS Answer.) Plaintiff has vigorously pursued his claims and believes that a class action would be certified. While the parties strongly believe in the relative merits of their positions, the parties also recognize that there are uncertainties in all forms of litigation, let alone complex class actions. (Exhibit 1, Settlement Agreement, ¶ 10.)

In considering the Settlement Agreement, Plaintiff and Class Counsel carefully balanced the risks of continuing to engage in protracted and contentious litigation against the benefits to the proposed Settlement Class, including the relatively large Settlement Fund. (*See generally*, *id.*) Similarly, the Defendants recognize that if a class is certified and Plaintiff prevails on the merits, they potentially face a higher amount of damages and major disruptions to their business operations. (*See generally, id.*) The parties face uncertainty, additional costs, and additional fees if the matter continues. The Settlement Agreement avoids these risks, saves judicial resources, and presents a fair and reasonable alternative to continuing to pursue litigation.

2. The Settlement Agreement Provides a Fair and Substantial Benefit to the Proposed Class; Each Settlement Class Member who Submits an Approved Claim is Likely to Receive More than $200.00 and may Receive up to $1,500.00.

As set forth above, the CCCS has agreed to pay up to $8,000,000.00 to settle this matter. (*Id.* § I.R.) Settlement Class Members will be paid a *pro rata* share of the Total Settlement Pool, less the attorneys' fees and costs, claims administration cost, and class representative's incentive award, for their Approved Claims, with the amount paid for each claim dependent upon the total number of Approved Claims, but in no case less than $70.00 or more than $1,500.00. (*Id.* § VI.E.) Even assuming there are 25,000 Settlement Class Members (which, as detailed in Section III.A, is likely the highest possible number) and a claims pool of $5,250,000.00[4], each Settlement Class Member who has an Approved Claim would likely be entitled to—at a minimum—approximately $210.00 for an Approved Claim. Moreover, if the number of Approved Claims fails to meet the Minimum Payment threshold of $1,500,000.00 (the sum of Approved Claims, administration costs, and Mr. Grider's incentive award), then the Settlement Class Members who submit Approved Claims will receive nearly $1,500.00 each—the maximum amount of damages authorized by the TCPA. (*Id.*)

3. The Settlement Agreement was Reached as a Result of Arm's Length Negotiations, Including Three Lengthy Mediations.

The Settlement Agreement is the result of over nine months of vigorous arm's length negotiations, including three lengthy mediation sessions conducted by the Honorable Lawrence R. Leavitt (Ret.) and the Honorable Carl W. Hoffman—the Magistrate Judge assigned to the Matter. (Exhibit 6, Kennedy Decl. ¶¶ 3-8.) The time and effort spent on negotiations, including three lengthy mediations, militate in favor of preliminary approval of the Settlement Agreement. *See in re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 450 (C.D.

---

[4] $8,000,000.00 less attorneys' fees and costs ($2,640,000.00), administration costs ($100,000.00), and incentive award ($10,000.00).

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Cal. 2014) ("[C]onsidering the number of mediations held, the court concludes that the settlement is a product of informed, arms-length negotiations, and is therefore entitled to a presumption of fairness."); *Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014) ("[T]he parties' apparent careful investigation of the claims and their resolution in consideration of the views of a third party mediator weigh in favor of settlement."); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . . .").

4. Substantial Discovery has been Completed; Prior to Settlement Negotiations, the Parties were Preparing for an Evidentiary Hearing on Plaintiff's Motion for Class Certification.

Class action settlements negotiated after the parties have conducted a substantial amount of discovery are presumptively fair and reasonable. *See in re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.").

Here, prior to settlement negotiations, the parties conducted a substantial amount of discovery. (Exhibit 6, Kennedy Decl. ¶ 2.) Indeed, the parties were prepared to attend an evidentiary hearing on the Plaintiff's Motion for Class Certification when, one day prior to the hearing, they agreed to the primary framework of a settlement agreement. (*Id.* ¶ 5.) The fact that the parties engaged in substantial discovery prior to settlement weighs in favor of preliminary approval of the Settlement Agreement. *See in re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. at 610.

5. Counsel for the Parties—who have Considerable Experience in Complex Class Action Litigation—have Negotiated a Settlement Agreement that they Believe is Fair, Adequate, and Reasonable.

Courts give substantial weight to the views of experienced counsel when assessing the fairness of a class action settlement. *See Hanlon*, 150 F.3d at 1026; *see also Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) (holding, that although courts "should not blindly follow counsel's recommendations," such recommendations should "be given a presumption of reasonableness.")

Here, as detailed above, the parties are represented by counsel with considerable experience in complex class action litigation. Counsel for the parties believe that the Settlement Agreement is fair, adequate, and reasonable. (Exhibit 1, Settlement Agreement, ¶ 10.) The views of experienced counsel weigh in favor of preliminarily approving the Settlement Agreement. *See Hanlon*, 150 F.3d at 1026; *see also Boyd*, 485 F. Supp. at 622.

In sum, all of the factors relevant to the Court's preliminary fairness determination militate in favor of a finding that the Settlement Agreement, "taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027. Specifically: (i) the matter is highly contested and all parties face risk and uncertainty if litigation is continued; (ii) the Settlement Agreement provides a fair and substantial benefit—and likely, an extraordinary benefit—to the proposed Settlement Class Members; (iii) the Settlement Agreement is the product of vigorous arm's length negotiations, including three lengthy mediation sessions; (iv) substantial discovery was completed prior to the Settlement Agreement; and (v) counsel for the parties believe that the Settlement Agreement is fair, reasonable, and adequate.

D. This Court Should Confirm the Amendment of the Case Caption.

In anticipation of a class action settlement, the parties stipulated and Magistrate Judge Hoffman ordered this matter's title and case caption be changed to correctly identify the current parties since Mr. Grider is now the only remaining plaintiff in the case and five of the eight defendants have been dismissed from the case. Plaintiff respectfully requests that this Court confirm the Magistrate Judge's Order amending this matter's title and case caption in order to make the class action notices more reflective of the remaining parties, and to reflect the primacy of CCCS as the only remaining defendant in the case whom it is alleged made telephone calls in violation of the TCPA. (*See* ECF No. 221, Stipulation and Order to Amend Case Caption.)

E. The Proposed Method of Class Notice is Appropriate.

"Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025. Rule 23(c)(2)(B) provides that, for "any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Federal Rule of Civil Procedure 23(c)(2)(B) provides that "the notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

Here, the Direct Mail Notices, the Q&A Notice, and publication of the summary notice all provide the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The notices provide all the information required by Rule 23(c)(2)(B). (*See* Exhibit 3, Direct Mail Notice; Exhibit 4, Publication Notice; Exhibit 5, Q&A Notice.) Given the length of the Claims Period—120 days—the notices will give the Settlement Class Members sufficient time to make claims, comment on the Settlement Agreement, or to opt-out of the Settlement Agreement. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice mailed thirty-one (31) days prior to end of claims period); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (approving notice mailed twenty-six (26) days prior to end of claims period).

F. The Court Should Appoint ILYM Group, Inc. as Claims Administrator.

The parties have agreed upon and propose that the Court appoint ILYM Group, Inc. ("ILYM") to serve as the Claims Administrator. (Exhibit 1, Settlement Agreement, § I.C.) ILYM specializes in providing administrative services in class action litigation and has extensive experience in administering TCPA class action settlements. (Exhibit 8, Decl. Lisa Mullins, ¶¶ 2-4.) ILYM has been approved as a claims administrator in prior TCPA class action settlements. *See Sarabri v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 3:10-CV-1777 AJB NLS, 2012 WL 3991734, at *3 (S.D. Cal. Aug. 27, 2012) (approving ILYM as claims administrator for TCPA class action and noting that "[t]he Special Master is familiar with ILYM Group from prior class actions settlements and has found it to be well qualified and knowledgeable in all facets of class action administration, and can provide exemplary service to counsel and the class."), *report and recommendation adopted*, No. 10CV1777 AJB NLS, 2012 WL 3809123 (S.D. Cal. Sept. 4, 2012); *see also Barani v. Wells Fargo Bank, N.A.*, No. 12CV2999-GPC KSC, 2014 WL 1389329, at *9 (S.D. Cal. Apr. 9, 2014) (approving ILYM as claims administrator for TCPA class action); *Malta*, 2013 WL 444619, at *9 (same).

G. A Final Approval Hearing Should be Scheduled.

The last step in the settlement approval process is the formal Final Approval Hearing or Fairness Hearing, at which time the Court may hear all evidence and argument, both for and against, the

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

Settlement Agreement in order to evaluate its merits and determine whether it should be approved. Plaintiff requests that the hearing be held at least 60 days after the end of the Claim Period to allow sufficient time for providing: (1) the CAFA Notice,[5] (2) the Direct Mail Notice, and (3) for Settlement Class Members to make claims, to comment on the Settlement Agreement, or opt-out.

V. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court enter an order preliminarily approving the proposed Settlement Agreement, appointing Mr. Grider as Class Representative, and appointing Bailey❖Kennedy and Haines & Krieger as Class Counsel, and appointing ILYM as Claims Administrator.

DATED this 4th day of December, 2015.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSHUA M. DICKEY
PAUL C. WILLIAMS

GEORGE H. HAINES
DAVID H. KRIEGER
HAINES & KRIEGER
Attorneys for Plaintiffs

[5] CCCS will provide the required CAFA Notice pursuant to 28 U.S.C. § 1715 within ten days of this motion. (Exhibit 1, Settlement Agreement § XXI.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148
PHONE (702) 562-8820

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, I hereby certify that on the 4th day of December, 2015, a copy of the foregoing Plaintiff's Motion for: (1) Preliminary Approval of Class Action Settlement Agreement; and (2) Certification of Settlement Class was served on the following parties by filing and serving the same using the ECF system and/or by U.S. Mail, postage prepaid, to the last known address:

Patrick J. Reilly
Nicole E. Lovelock
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
preilly@hollandhart.com
nelovelock@hollandhart.com

Holly Stein Sollod
Admitted Pro Hac Vice
Kathleen Kramer Custer
Admitted Pro Hac Vice
c/o HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
hsteinsollod@hollandhart.com
kkcuster@hollandhart.com

Attorneys for Defendants

/s/ Sharon Murnane
An Employee of Bailey❖Kennedy